Supreme Court, U.S.
FILED
MAR - 3 1994
OFFICE OF THE CLERK

No. 93-880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN,
and SHIRLEY HOBBS,

Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., AWARE WOMEN'S CENTER FOR CHOICE, INC., EPOC CLINIC, INC. and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

BRIEF OF THE RUTHERFORD INSTITUTE *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

John W. Whitehead
Alexis I. Crow*
The Rutherford Institute
1445 East Rio Road
Charlottesville, VA 22901
(814) 978-3888
*Counsel of Record

Attorneys for Amicus Curiae

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

QUESTIONS PRESENTED

I. Whether an anti-speech injunction purporting to bind all non-parties who are "perceived as advocating a "pro-life" viewpoint is void for lack of jurisdiction.

II. Whether an anti-speech injunction which discriminates on the bases of viewpoint and content is an unconstitutional prior restraint.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
INTEREST OF AMICUS CURIAE 1
STATEMENT OF FACTS 2
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 4
ARGUMENT 5
CONCLUSION 16

TABLE OF AUTHORITIES

Cases	Pages
Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 833 (2d Cir. 1930)	7, 8, 9, 10
American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd* 106 S.Ct. 1172 (1986)	15
Backo v. Local 281, United Brotherhood of Carpenters and Joiners, 438 F. 2d 176, 181 (2d Cir. 1970)	7
Baltimore Transit Company v. Flynn, 50 F. Supp. 382, 386 (D. Md. 1943)	9
Baltz v. The Fair, 178 F. Supp. 691, 693 (N.D. Ill. 1959)	9
Berger v. Superior Court of Sacramento County, 167 P. 143 (Cal. 1917)	7
Bonapart v. Camden & A.R. Company, 205 F. Cas. 217 (C.C.N.Y. 1830) (No. 1,617)	5
Carey v. Brown, 447 U.S. 455, 465 (1980)	15
Chase National Bank v. City of Norwalk, Ohio, 291 U.S. 431, 437, 54 S. Ct. 475, 477 (1934)	8, 9, 10
Cheffer v. McGregor, 6 F. 3d 705 (11th Cir. 1993)	2, 3, 4
Chicago v. Mosely, 408 U.S. 92, 95-96 (1972)	13, 14
Chisolm v. Caines, 147 F. Supp. 188, 191 (E.D.S.C. 1954)	9
City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925, 929 (1986)	15
Clark v. Community for Creative Non-Violence, 104 S.Ct. 3065, 3070 (1984)	14

Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 548 (1980)	14, 15
Cornelius v. NAACP Legal Defense & Educational Fund, 105 S.Ct. 3439, 3454 (1985)	15
Edwards v. South Carolina, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 697 (1963)	12
Forsyth County, Georgia v. The Nationalist Movement, 113 S. Ct. 40, 121 L. Ed. 2d 11 (1992)	13
Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988)	12, 13
Hague v. CIO, 307 U.S. 496, 515, 59 S. Ct. 954, 963-64, 83 L. Ed. 1423 (1939)	12
In re: Wholesale Licensed Alcoholic Beverages Salesman's Union, 6A. 2d 660 (Court of Chancery N.J. 1939)	7
Kean v. Hurley, 179 F. 2d 888, 190 (8th Cir. 1950)	9
Kunz v. New York, 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 280 (1951)	12
Organization for a Better Austin v. Keefe, 402 U.S. 415, 420, 91 S. Ct. 1575, 1578, 29 L. Ed. 2d 1 (1971)	13
Pacific Gas & Electric. v. P.U.C. of California, 106 S.Ct. 903, 910-11 (1986)	15
Petersen v. Fee International, LTD, 435 F. Supp. 938, 942 (W.D. Okl. 1975)	9
Regal Knitwear Co. v. National Labor Relations Board, 324 U.S. 9, 13, 65 S. Ct. 478, 89 L. Ed. 661, 666 (1945)	9, 10

Regan v. Time, Inc., 468 U.S. 641, 648-649 (1984) 13, 15

Saia v. New York, 334 U.S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574 (1948) 12

State University of New York v. Denton, 316 N.Y.S. 297 (4th App. Div. 1970) 11

Swetland v. Curry, 188 F. 2d. 841, 843 (6th Cir. 1951) 9

Texas v. Johnson, 109 S. Ct. 2533, 2542 (1989) 13

United States v. Debs, 64 F. 724 (N.D. Ill. 1894) 5

United States v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983) 12

Widmar v. Vincent, 454 U.S. 263 (1981) 15

Wright v. County School Board of Greensville County, Va., 309 F. Supp. 671, 677 (E.D. Va. 1970) 9

Young v. American Mini Theatres, 427 U.S. 50, 65 (1976) 13, 14

Statutes and Constitutional Provisions

H.R. Rep. No. 612, 62d Cong. 2d Sess. 1 (1912) 5

Rule 1.610 of the Florida Rules of Civil Procedure Rule 37 . . . . . 5, 6, 10

Rule 65(d) Fed. R. Civ. P. . . . . *passim*

Other Authorities

Nimmer, M., Nimmer On Freedom Of Speech § 2.07 (1989) 14

No. 93-880

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,

Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., AWARE WOMEN'S CENTER FOR CHOICE, INC., EPOC CLINIC, INC. and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

BRIEF OF THE RUTHERFORD INSTITUTE *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is greatly concerned about the threat posed by overbroad, anti-speech injunctions to the exercise of free speech interests generally. Given the "legislative tone" of the state court's injunction at issue here, and the ramifications of such an overbroad, content-based injunction on the exercise of protected speech, the Florida Supreme Court's

[1] Counsel of record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk, pursuant to Rule 37.

decision is constitutionally intolerable. Such a precedent, if allowed to stand, would serve as a monument to the power of government to arbitrarily restrict any speech, even in a quintessential public forum, merely because it is controversial or divisive.

Amicus Curiae, The Rutherford Institute, is an international, non-profit religious organization named for Samuel Rutherford, a seventh-century Scottish minister and rector at St. Andrew's University. The Rutherford Institute is dedicated to the defense of free speech issues grounded in religious beliefs, and undertakes to assist litigants and to participate in significant cases relating to First Amendment freedoms. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amicus Curiae adopts by reference the statement of stipulated facts filed with this Court.

STATEMENT OF THE CASE

While Amicus Curiae incorporates by reference the facts contained in the brief of the petitioners, it is useful here to restate certain salient facts contained in the Trial Court's colloquy from the bench during the April 13, 1993, contempt hearing. A brief recitation of this portion of the record below serves to underscore the finding by the Eleventh Circuit Court of Appeals that the injunction is not viewpoint-neutral.[2] In addition, these excerpts demonstrate the total absence of any factual basis for finding the contemnors acted "in concert" with any named defendant.

MR. LACY: You mentioned to other John Does that we were arrested for being in a public place in concert with people that were on the Injunction whether we had read the Injunction

[2] *Cheffer v. McGregor*, 6 F. 3d 705 (11th Cir. 1993).

or not. And I was wondering how we can — why we were arrested and confined as being in concert with these people that we don't know, when other people weren't, that were in the same buffer zone, and it was kind of selective as to who was picked and who was arrested and who was obtained for the same buffer zone in the same public injunction.

THE COURT: Mr. Lacy, I understand that those on the other side of the issue were also in the area. If you are referring to them, the Injunction did not pertain to those on the other side of the issue, because the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is the selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection. If others who are pro-life were not selected, I can't answer that. It is the officer's discretion on the scene as to who he arrests.

(Transcript of April 13, 1993, contempt hearing at pp. 104-105.)

JOHN DOE NO. 16: When you issued the injunction, did you determine that it would only apply to — that it would apply only to people that were demonstrating they were pro-life?

THE COURT: In effect, yes.

(Transcript of April 13, 1993, contempt hearing at p. 116.)

There is no dispute but that persons unrelated to the named defendants who happened into the buffer zone, without notice of the terms of the injunction, were arrested and incarcerated merely for penetrating the buffer zone. Law enforcement authorities were given very broad discretion in the determination of who was acting "in concert" with those named in the injunction. Moreover, there is no dispute but that the law enforcement officials charged with enforcing the injunction understood that it applied only to those engaging in *pro-life* speech activity.[3]

[3] See *Cheffer v. McGregor*, 6 F. 3d 705 (11th Cir. 1993). As the Eleventh Circuit Court of Appeals noted:

SUMMARY OF ARGUMENT

Although the setting for this case is the divisive abortion controversy, it is not merely an "abortion case." This case involves principles of procedural and substantive due process and jurisdiction that go to the core values of American jurisprudence concerning the legitimate authority of a court. Its implications extend beyond this controversy to any case involving picketing and speech and, indeed, to nearly any case in which injunctive relief is sought and/or contempt sanctions are imposed.

The Amended Permanent Injunction (herein-after "Injunction"), entered on April 8, 1993, by the Circuit Court for the Eighteenth Judicial Circuit of Florida, violates constitutional doctrines of procedural due process and jurisdiction which prohibit a court from punishing as contempt the acts of non-parties when there is neither an allegation nor a finding that they are legally identified with, or aiders and abetters of, a party properly enjoined.

Moreover, the injunction violates well-established constitutional free speech doctrines, limiting the power of a court to impose content-based restraints on the exercise of free speech in a quintessential public forum. This, coupled with the imposition of criminal sanctions on contemnors, subjectively perceived as acting "in concert" with the named defendants, constitutes an impermissible prior restraint on the exercise of free speech rights. It is axiomatic that one's right to free expression of ideas cannot be conditioned on the subjective perceptions of others, here law enforcement officials, who may arbitrarily determine

---

Several of those arrested testified (at a preliminary hearing convened by Judge McGregor as provided for in the injunction) that they were designated for arrest by clinic workers and police officers because they were perceived to be "pro-life."

Id. at 708.

that the speaker is motivated by a particular idealogy or set of beliefs.

ARGUMENT

I. The Phrase "In Concert" is a Jurisdictional Limitation on a Court's Power to Punish as Contempt the Acts of Non-Parties.

An injunction has been described as the most extraordinary power exercisable by a court of equity.

> There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion or more dangerous in a doubtful case, than the issuing [of] an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting, preventive process of injunction; but that will not be awarded in doubtful cases, or new ones, not coming within well-established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of the Court, not of the party who prays for it.

Bonapart v. Camden & A.R. Company, 205 F. Cas. 217 (C.C.N.Y. 1830)(No. 1,617).

A. The Safeguards in Rule 1.610 Fla. R. Civ. Pro. Serve as a Check on the Injunctive Power of a Court.

Rule 1.610 of the Florida Rules of Civil Procedure (hereinafter "Rule 1.610"), like its federal corollary Rule 65(d), limits the jurisdiction of a court to issue or enforce an injunction by providing that an injunction binds only "the parties to the action,

their officers, agents, servants, employees, attorneys and those persons *in active concert* or participation with them who receive actual notice of the injunction."[4] (emphasis added.)

The legislative history of Rule 65(d) Fed. R. Civ. P. (hereinafter "Rule 65(d)") makes plain the impropriety of the Florida Supreme Court's decision affirming the constitutionality of the injunction. The rule is drawn from the Clayton Act. *See* Legislative Commentary to Rule 65(d). The Clayton Act was enacted to curtail abuses of federal strike injunctions by "legislation directed to those specific matters which have given rise to the most criticism." H.R. Rep. No. 612, 62d Cong. 2d Sess. 1 (1912). Section 19 of the Act, from which Rule 65(d) is drawn, was designed as a "safeguard" to prevent the issuance of "blanket" injunctions in which large numbers of people could be punished for breaching injunctions issued in cases to which they had not been made parties. *Id.* at 4. The report observed that the language now contained in Rule 65(d) is the proper rule, but unfortunately it was not uniformly observed. *Id.* at 5-6. As an example, the report cited *United States v. Debs*, 64 F. 724 (N.D. Ill. 1894) which involved criminal contempts convictions from the Pullman strike, and observed "much of the criticism which arose from the *Debs* case was due to the fact that the Court undertook to make the order effective not only upon the parties to the suit and those in concert with them, but upon all other persons whomsoever." *Id.* at 6. Thus, with large, divisive and often violent labor strikes in mind, Congress *intentionally* re-

[4] The relevant portion of Rule 1.610 Fla. R. Civ. Pro. is as follows:

(c) Form and Scope. Every injunction shall specify the reasons for entry, shall describe in reasonable detail the act or acts restrained without reference to a pleading or another document and shall be binding on the parties to the action, their officers, agents, servants, employees and attorneys and on those persons in active concert or participation with them who receive actual notice of the injunction.

stricted the contempt power of courts to the confines now expressed in Rule 65(d).[5]

As the late Judge Learned Hand pointed out in *Alemite Mfg. Corp. v. Staff*, 42 F. 2d 832, 833 (2d Cir. 1930):

> It [a court] cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen* [sound and fury signifying nothing], and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore have their day in court. Thus, the only occasion when a person not a party may be punished is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has the power to forbid, and act of a party. This means that

[5] The injunction in this case is not analogous to an injunction issued against a labor union. Such an injunction binds the union named in the lawsuit, and extends to its members because they are legally identified with it. E.g. *Backo v. Local 281, United Brotherhood of Carpenters and Joiners*, 438 F. 2d 176, 181 (2d Cir. 1970). However, when a court restricts the picketing activity of a union, that decree does *not* bind another union whose members wish to picket, or anyone else who acts independently of the union enjoined. *See Berger v. Superior Court of Sacramento County*, 167 P. 143 (Cal. 1917)(Supreme Court of California reversed the contempt conviction of a non-party even though he had received notice of the injunction, because there was neither an allegation nor evidence to establish that he was a member of the union enjoined); *In re: Wholesale Licensed Alcoholic Beverages Salesman's Union*, 6 A. 2d 660 (Court of Chancery N.J. 1939)(contempt convictions of salesmen reversed because they were not confederates or aiders or abetters of the enjoined distillery union, even though they did "an act of the same character of that which the [union enjoined][was] forbidden to commit.") In stark contrast to these narrow injunctions, the injunction at issue in the instant case was against all persons picketing, patrolling, demonstrating, etc. within the thirty-six foot buffer zone.

> the respondent must either abet the defendant, or must be legally identified with him . . . this is far from being a formal distinction; it goes deep into the powers of a Court of Equity . . . it is by ignoring such procedural limitations that the injunction of a Court of Equity may by slow steps be made to realize the worst fears of those who are jealous of its prerogative.

Alemite Mfg. Corp. v. Staff, 42 F. 2d 832, 832-33 (2d Cir. 1930).

Accordingly, the Court in *Alemite* reversed the contempt conviction of the non-party respondent who was not legally identified with or an aider or abetter of a party enjoined.

Following *Alemite*, this Court held in *Chase National Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 437, 54 S. Ct. 475, 477 (1934) that the district court erred by "extending the injunction to all persons to whom notice of the injunction should come." It observed:

> [I]t is true that persons not technically agents or employees may be specifically enjoined from knowingly aiding a defendant in performing an act if their relation is that of associate or confederate. Since such persons are legally identified with the defendant and privy to his contempt, the provision merely makes explicit as to them that which the law already implies. But by extending the injunction to "all persons to whom notice of the injunction should come," the District Court assumed to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law . . . to subject them to such peril violates established principals of equity jurisdiction and procedure.

B. The Florida Supreme Court's Affirmance of the Injunction Is at Odds with Well-Settled Precedent Governing the Injunctive Power of a Court Over Non-Parties.

The law of *Alemite* and *Chase* is uniformly followed by courts construing the language of Rule 65(d).[6] The Florida Supreme Court's decision in this case marks a dangerous and unprecedented departure from this line of authority, and undermines the safeguards extant in this rule. Without such a check on a court's power to issue and enforce injunctions, strangers who, without notice, happen into a "buffer zone" do so at peril of arrest and incarceration.

[6] See e.g., *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9, 13, 65 S. Ct. 478, 89 L. Ed. 661, 666 (1945)(Courts "may not grant an enforceable order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to the law"); *Swetland v. Curry*, 188 F. 2d. 841, 843 (6th Cir. 1951)(a non-party "may not be held guilty of contempt for violating an injunction unless he is shown to be identified with or is an aider or abetter of the party enjoined"); *Kean v. Hurley*, 179 F. 2d 888, 190 (8th Cir. 1950)("persons who are not parties to the injunction or in privity with them . . . are not bound by the decree and cannot be held liable for acts done contrary thereto even though the decree assumes to bind them"); *Petersen v. Fee International, LTD*, 435 F. Supp. 938, 942 (W.D. Okl. 1975) (Rule 65(d) follows the common law rule that non-parties are bound by an injunction only if they are legally identified with a named party or aided or abetted the named party in his violation of the decree); *Wright v. County School Board of Greensville County, Va.*, 309 F. Supp. 671, 677 (E.D. Va. 1970) (Rule 65(d) fixes the scope of valid injunctions, and terms in a decree exceeding the rule are of no effect; non-parties who act independently are not subject to sanctions); *Chisolm v. Caines*, 147 F. Supp. 188, 191 (E.D.S.C. 1954)("Injunction cannot issue and bind the public at large" even though it purports to do so); *Baltz v. The Fair*, 178 F. Supp. 691, 693 (N.D. Ill. 1959)("Persons who are not parties to the injunction or in privity with them . . . are not bound by the decree insofar as it operates in person and cannot be held liable for acts done contrary to its terms"); *Baltimore Transit Company v. Flynn*, 50 F. Supp. 382, 386 (D. Md. 1943)(A court "cannot lawfully enjoin the world at large"). Each of these cases holds that terms in an injunction exceeding Rule 65(d) are void.

II. Constitutional Doctrines of Procedural Due Process and Jurisdiction Prohibit a Court from Punishing as Contempt the Acts of Non-Parties When There is Neither an Allegation nor a Finding that They Are Legally Identified With, or Aiders and Abetters of, a Party Properly Enjoined.

Embodied in Rule 65(d) and Rule 1.610 is the principle that an injunction violates due process rights when it "assume[s] to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to the law." *Regal Knitwear*, 324 U.S. 9, 13; *Chase*, 291 U.S. at 437.

Thus, the injunction issued in this case is void because it violates principles of procedural due process and jurisdiction which require that a person be given notice of litigation and an opportunity to be heard *before* an injunction can issue against him. Rule 65(d) permits injunctions to be enforced against named parties whose rights have been lawfully adjudicated. It also reaches persons legally identified with the enjoined party (agents, etc.) to prevent him from circumventing the decree through persons acting under his control. Finally, Rule 65(d) reaches persons who aid and abet the named party in his violation of the injunction[7] and who thereby help "to bring about, not merely what the decree forbids, because it may have gone too far, but what is has the power to forbid, the act of a party." *Alemite*, 42 F. 2d at 833. The inclusion of these latter categories of contemnors comports with doctrines of procedural due process because such individuals are asserting the interests of the named party whose rights have been adjudicated.

Moreover, the constitutional infirmity of the injunction in the case *sub judice* is not cured merely through the provision of notice to the non-party actors. The fallacy of such reasoning

[7] The case law cited in fn. 5 uniformly construes "acting in active concert or participation" to mean "aiding and abetting the named party in his violation of the decree."

was effectively addressed in the somewhat analogous case of *State University of New York v. Denton*, 316 N.Y.S. 297 (4th App. Div. 1970). There, the plaintiffs, a state university, sought and obtained an injunction in the context of a series of violent campus disturbances. The injunction prohibited the named student defendants and "anyone who received notice of the injunction" from interfering with the operation of the university. *Id.* at 298. Subsequently, a group of forty-five university professors who had not been named as parties in the underlying action were convicted of contempt for staging a sit-down strike in the office of the university's president. In reversing the contempt convictions, the New York Appellate Court (after a thorough analysis of applicable law) stated, "The threshold question to be considered, therefore, is whether appellants were bound by the order of March 5, which was addressed to the named student defendants and 'all persons have knowledge' of the order, and whether, accordingly appellants may be guilty of criminal contempt for its violation. Well-settled principals of law require a negative answer to the inquiry." *Id.* at 300.

The *Denton* Court explained that notice of an injunction to "a non-party alone is not sufficient without proof of agency or collusion with named defendants to impose liability for a violation," *Id.* at 301, "and that the mere fact that an actor *may be sympathetic to the desires of one properly bound* by an injunction, or that by his conduct the former accomplishes what the party enjoined wants accomplished, is not sufficient to establish beyond a reasonable doubt that the conduct was carried out in combination or collusion with the named enjoinee." *Id.* at 302 (emphasis added).

III. The Anti-Speech Injunction Constitutes a Prior Restraint Upon Protected Free Speech and is Otherwise Unconstitutional Because of Its Content-Based Discriminatory Effect.

The power of the State to abridge freedom of speech on a public sidewalk has been limited by this Court's repeated pronouncements. These form a core constitutional value woven throughout the fabric of First Amendment doctrine. *See Edwards v. South Carolina*, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 697 (1963); *Saia v. New York*, 334 U.S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574 (1948); *Kunz v. New York*, 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 280 (1951); *United States v. Grace*, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983). The Florida Supreme Court's strained application of *Frisby v. Schultz*, 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) stands in blatant contravention of these well-settled pronouncements.

A. The Florida Supreme Court Grossly Exaggerated the Scope of this Court's Holding in *Frisby*.

The Court's reliance on *Frisby* as a justification for criminalizing pure speech activity on a busy thoroughfare is a distortion of this Court's narrow holding in that case. As was emphasized again in *Frisby*, the beginning point of inquiry in a free speech case is the "place" or "forum" where the expressive activity takes place. "'[T]ime out of mind'" public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum." *Frisby*, 108 S. Ct. at 2499 (citing *Hague v. CIO*, 307 U.S. 496, 515, 59 S. Ct. 954, 963-64, 83 L. Ed. 1423 (1939). And as this Court was careful to point out, this phrase is not a mere "cliche," and "stringent standards" must be applied to any governmental attempt to restrict free speech in such public fora. *Id.* at 2500.

The key distinction between the activity enjoined in the case *sub judice* and that involved in *Frisby* is obvious, as was expressly recognized by this Court: "In such cases 'the flow of

information [is not] into . . . household[s], but to the public.'" *Frisby*, 108 S. Ct. at 2503 (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420, 91 S. Ct. 1575, 1578, 29 L. Ed. 2d 1 (1971). This Court further stated: "The type of picketers banned by the Brookfield Ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident . . ." *Id.* at 2503.

As a consequence of the Florida Supreme Court's exaggeration of the holding in *Frisby*, the power of the State to abridge protected pure speech is greatly expanded. Such a precedent, if allowed to stand, will have a pronounced effect on legitimate, peaceful speech activity.

B. The Florida Supreme Court Failed to Properly Differentiate Between "Non-Speech" and "Anti-Speech" in its Analysis of Viewpoint and Content-Based Discrimination.

This Court held in *Forsyth County, Georgia v. The Nationalist Movement*, 113 S. Ct. 40, 121 L. Ed. 2d 11 (1992), "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." (citing *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984). It is therefore imperative that content-based regulation of speech undergo the strictest of constitutional scrutiny. This jurisprudential rule is based on the presupposition of equality of all speech, regardless of how provocative or controversial. *Texas v. Johnson*, 109 S. Ct. 2533, 2542 (1989). As this Court has stated, the "essence" of content neutrality simply commands that the "regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator." *Young v. American Mini Theatres*, 427 U.S. 50, 65 (1976).

While *Young* marked a departure from the absolute protection against all forms of discriminatory regulation of speech enunciated in *Chicago v. Mosely*, 408 U.S. 92, 95-96 (1972),

the critical distinction lies in what may be termed "non-speech" restrictions and "anti-speech" restrictions. This dichotomy may be illustrated by contrasting the injunctions at issue in *Mosely* and *Young*.

The nonpicketing regulation in *Mosely* was aimed at preventing disruptions of school activities. The mere fact that picketing occurs in the vicinity of a school, during school hours, can be disruptive irrespective of the message conveyed. However, such an injunction is intended to prevent disruptions of school activities. Therefore, the ordinance in *Mosely* constituted a non-speech restriction. Such restrictions are, of necessity, content neutral, since the message being conveyed is immaterial; it is the expressive activity itself which is forbidden.[8]

By contrast, when a restriction is anti-speech, as was the case in *Young*, then the speech restriction may apply only to certain subject matters and not to other communications.[9] Anti-speech restrictions are presumptively invalid, while non-speech restrictions are presumptively valid. *See generally*, Nimmer, M., Nimmer On Freedom Of Speech § 2.07 (1989). This point

[8] Another recent example is found in the case of *Clark v. Community for Creative Non-Violence*, 104 S.Ct. 3065, 3070 (1984)(upholding the constitutionality of a Park Service regulation prohibiting overnight sleeping in Lafayette Park or the Mall in Washington D.C., even in connection with a demonstration in support of the homeless, on the grounds that "[t]he requirement that the regulation be content neutral is clearly satisfied.").

[9] However, Justice Stevens has taken the position that even if a subject-matter restriction is otherwise permissible, it may nonetheless be unconstitutional if it restricts expression which is controversial in nature. Such restrictions are in his opinion unconstitutional *per se* since "the use of the 'controversial' nature of speech as the touchstone for its regulation threatens a value at the very core of the First Amendment, the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.'" *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 548 (1980)(Stevens, J., concurring).

is best illustrated in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), where this Court recognized the validity of subject matter differentiation in connection with anti-speech restrictions (there, monthly inserts in electric bills which contained "opinions or viewpoints on controversial issues of public policy), but nevertheless invalidated the restriction in that case as not serving a "compelling state interest."[10]

Viewpoint neutrality is an absolutely essential component of all anti-speech injunctions. While the distinction between "subject matter neutrality" and "viewpoint neutrality" is not always readily apparent, this Court has repeatedly recognized and reaffirmed the requirement that viewpoint neutrality must always exist — even in cases where the subject matter neutrality is not required. *Regan v. Time, Inc.*, 104 S.Ct. 3262, 3271 (1984); *Cornelius v. NAACP Legal Defense & Educational Fund*, 105 S.Ct. 3439, 3454 (1985); *Pacific Gas & Electric. v. P.U.C. of California*, 106 S.Ct. 903, 910-11 (1986); *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925, 929 (1986); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* 106 S.Ct. 1172 (1986).

The Florida Supreme Court blurred the distinction between non-speech restrictions and anti-speech restrictions. In upholding an injunction which admittedly bans only pro-life speech activity, the court applied a nonspeech rationale to the setting, finding, in essence, that all speech that is *perceived as pro-life* and occurring within 36 feet of an abortion clinic is *per se* disruptive. Thus, under the Court's flawed reasoning, the mere fact that the injunction "make[s] no mention whatsoever of abortion", it is content-neutral.

The obvious danger inherent in such a broad, sweeping approach to injunctions regulating speech is that by merely using

[10] See also *Widmar v. Vincent*, 454 U.S. 263 (1981); *Carey v. Brown*, 447 U.S. 455, 465 (1980)(content-based distinction permissible only where there is a compelling state interest).

care not to mention any specific category of speech, a court may nonetheless, through arbitrary restrictions, control or chill expression of a particular disfavored viewpoint. The Court's colloquy from the contempt hearing of April 13, 1993, clearly demonstrates this dynamic in operation in the instant case. (*See supra* pp. 3-4.)

CONCLUSION

The "buffer zone" created by the trial court in this case has been elevated by the Florida Supreme Court to a kind of constitutional "no man's land." The very notion that peaceful expression in a quintessential public forum may be selectively banned, and its exercise criminalized, due *solely* to the particular viewpoint expressed is itself anomalous. But the application of such a legislative decree to all persons "perceived" as advocating the judicially declared subversive view, regardless of whether they are "*in active concert*" with a party to the action, is tyranny in its purest form. In the interest of preserving the dignity of the fundamental constitutional rights at stake, as well as the procedural safeguards which serve as a check on such a tyrannical abuse of authority, the decision below must be reversed.

Respectfully submitted,

Alexis I. Crow
Counsel of Record
John W. Whitehead
The Rutherford Institute
1445 E. Rio Road
Charlottesville, VA 22901
804-978-3888

Date: March 2, 1994